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Tommy Smith, an Individual d/b/a Smith Electric and International Brotherhood of Electrical Workers, Local 1316. Case 10–CA–29569

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the Union on August 30, 1996, the General Counsel of the National Labor Relations Board issued a complaint on November 15, 1996, against Tommy Smith, an Individual d/b/a Smith Electric, the Respondent, alleging that it has violated Section 8(a)(3) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint,¹ the Respondent failed to file an answer.

On February 3, 1997, the General Counsel filed a Motion for Summary Judgment with the Board. On February 4, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated January 2, 1997, notified the Respondent that unless an answer were received by January 17, 1997, a Motion for Summary Judgment would be filed.

¹The General Counsel's motion indicates the complaint was served by regular and certified mail but that the certified mail was returned as "unclaimed." However, failure or refusal to accept service cannot defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). Furthermore, the failure of the Postal Service to return a document served by regular mail indicates actual receipt of that document by the Respondent. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987). Therefore, we find that the Respondent was properly served with the complaint.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has done business as a sole proprietor in various counties throughout the States of Georgia and Tennessee and has been engaged as an electrical contractor in the building and construction industry, providing electrical contracting and related services.

At all material times, Respondent Tommy Smith has operated a limited partnership, corporation, or sole proprietorship with an office and place of business in Jefferson, Georgia, which has been engaged in the manufacture, assembly, installation, and nonretail sale of cabinetry and related products. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its foregoing operations, performed services valued in excess of \$50,000 in States other than the State of Georgia, and provided services valued in excess of \$50,000, or has sold and shipped goods valued in excess of \$50,000, to various enterprises located within the State of Georgia, each of which enterprises meets the Board's jurisdictional requirements under the direct inflow, direct outflow, or retail standard. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About May 14, 1996, the Respondent discharged and failed and refused to reinstate its employee Mark Weathers because he joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging Mark Weathers, we shall order the Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge and to notify the discriminatee in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Tommy Smith, an Individual d/b/a Smith Electric, Jefferson, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or failing or refusing to reinstate employees because they join, support, or assist the International Brotherhood of Electrical Workers, Local 1316 or engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Mark Weathers full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Mark Weathers whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the un-

lawful discharge and within 3 days thereafter notify Mark Weathers that this has been done and that the unlawful discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Jefferson, Georgia, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 27, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or fail or refuse to reinstate employees because they join, support, or assist the International Brotherhood of Electrical Workers, Local 1316 or engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this order, offer Mark Weathers full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Weathers whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in a decision of the National Labor Relations Board.

WE WILL, within 14 days from the date of this Order, expunge from our files any and all references to the unlawful discharge and within 3 days thereafter notify Mark Weathers that this has been done and that the unlawful discharge will not be used against him in any way.

TOMMY SMITH, AN INDIVIDUAL D/B/A
SMITH ELECTRIC